BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY L. ADAMS, JR.	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,040,950
J.E. DUNN CONSTRUCTION COMPANY	)	& 1,041,970
Respondent	)	
AND	)	
	)	
MIDWEST BUILDERS CASUALTY MUTUAL	)	
COMPANY and AMERICAN HOME	)	
ASSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier American Home Assurance Company (respondent) appeal the December 2, 2010, Award of Administrative Law Judge Steven J. Howard (ALJ). Claimant was awarded benefits for an 80.5 percent permanent partial general (work) disability based on a 61.1 percent task loss and a 100 percent wage loss. The ALJ determined that, while claimant had been hired in Missouri, the headquarters of respondent is in Missouri, claimant's union was located in Missouri, and claimant's injury on February 20, 2008, occurred while claimant was working in Missouri, claimant's principal place of employment was Kansas. Therefore, the Kansas Division of Workers Compensation has jurisdiction over this matter.

Claimant appeared by his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, John David Jurcyk of Roeland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. At the time of the Regular Hearing, the parties stipulated that claimant's base wage was $1,097.21 per week. The parties have since stipulated that claimant's fringe benefits were valued at $19.38 per hour. The Board heard oral argument on March 8, 2011.

ISSUES

1. Where was claimant when the final act required to complete claimant's contract of employment with respondent was performed? Respondent contends that claimant was in Missouri when the contract of employment was performed. Claimant contends that claimant was in Kansas, filling out employment papers when the contract was completed.

2. What is the definition of principal place of employment under the Kansas Workers Compensation Act (Act) and does it apply to claimant or respondent? If it applies to claimant, where was his principal place of employment on February 20, 2008, the date of accident in this matter?

3. What is the nature and extent of claimant's injuries and disability? The whole body functional impairment of 10 percent has been stipulated to by the parties. However, respondent argues that the task loss opinion of board certified orthopedic surgeon John A. Pazell, M.D., pursuant to K.S.A. 44-510e, cannot be used as it was not given under the restrictions of Adrian P. Jackson, M.D. The parties stipulated at the regular hearing that Dr. Jackson's restrictions "are appropriate for the claim".[1] However, the restrictions of Dr. Jackson were not placed into the record at the regular hearing. The only place that any reference to Dr. Jackson's restrictions is contained is in the April 15, 2010, report of vocational expert Michael J. Dreiling. Respondent further disputes the opinion of Dr. Pazell, as it was given at a time when claimant had not yet reached maximum medical improvement (MMI). Therefore, respondent contends that claimant should be limited to his percentage of functional impairment.

FINDINGS OF FACT

Claimant began working for respondent in 1997 as an iron worker. Prior to working for respondent, claimant had worked for Bryan-Ohlmeier Construction (Ohlmeier). On the day claimant was released from his superintendent position at Ohlmeier, claimant called Steve Wallace, the head iron worker superintendent with respondent, and asked for a job. Claimant's phone call originated from Ohlmeier's offices. Claimant initially testified that when he called Mr. Wallace at respondent's office in Missouri, and detailed his work experience, he was told that "I need someone, you're hired".[2] Claimant then went to the Olathe Medical Center, where he began working. Claimant later testified that when he talked to Mr. Wallace, he was told to go to the Ironworkers Union hall to go through an apprentice program. The Ironworkers Union hall was also located in Missouri. Claimant

[1] R.H. Trans. at 4.

[2] R.H. Trans. at 23-24.

spoke to Chuck Noland, the apprenticeship director at the Union school. Mr. Noland advised claimant that he had to enroll in the program and pay for the school before he could go out on a job. After paying his union dues and buying tools, claimant went to the Olathe Medical Center job site, per Mr. Noland's instructions, where he talked to "Hunky", the superintendent on the job site. Claimant told Hunky what Mr. Wallace had said. Claimant then filled out income papers and deduction papers, underwent safety orientation and went to work. These were conditions precedent to claimant's hire and, therefore, the last acts necessary to complete the contract of hire occurred in Kansas.

Claimant worked continuously for respondent from 1997 until the date of accident on February 20, 2008. On that date, claimant was working on the "Plaza West Edge" job, which was located in Missouri. Claimant was standing on the ground when he was struck by a 6-foot 2 x 4 piece of wood which had fallen from the sixth or eighth floor. The board struck claimant on his head and right shoulder. Claimant was wearing a hard hat when struck. Claimant was knocked unconscious and was transported to the KU Medical Center (KU). Claimant was treated by several doctors, receiving two or three different sets of restrictions. Claimant returned to restricted duty with respondent. However, when claimant received the final restrictions of no lifting over 45 pounds and limited crawling, kneeling and crouching, he was laid off. Crawling, kneeling and crouching are activities done frequently as an iron worker. Claimant's last day for respondent was June 12, 2009.

When claimant arrived at KU, x-rays of his pelvis, cervical spine, chest and right shoulder were taken and read as unremarkable. CT scans of his head and chest were also read as unremarkable. Claimant was subsequently seen at OHS CompCare by Gerald Dennis, II, M.D. At that time, claimant's neck and shoulder were painful and he complained of dizziness, headache, lightheadedness, nausea, confusion, balance problems and sometimes decreased temperature sensation in his left hand versus the right hand. Claimant's neurological examination was described as intact. Claimant was treated with pain medications and taken off work. Claimant was again examined by Dr. Dennis on February 25, 2008. Claimant again displayed difficulty with memory and cerebral-type symptoms.

Claimant was referred to neurologist James Applebaum, M.D., on February 27, 2008, with complaints of headaches which increased with concentration, neck and right shoulder pain, paresthesias in his hands, weak feeling in his legs, and difficulty with blurred vision, tinnitus, and memory loss. Dr. Applebaum diagnosed post-concussion syndrome. Claimant was then seen at the Dickson-Diveley Midwest Orthopaedic Clinic by Charles Rhoades, M.D., for the neck and shoulder pain, and cervical spasm. Claimant was told to continue with physical therapy and told if he did not improve, an MRI would be ordered. By April 9, 2008, claimant advised Dr. Rhoades that his shoulder contusion had resolved but the problems with his cervical spine and head continued. MRIs on April 17, 2008, indicated left maxillary sinus disease and a C3-4 disk osteophyte complex flattening, nearly effacing the anterior thecal sac. No significant central canal stenosis or neural foraminal stenosis was noted.

An examination by Dr. Vito Carabetta on May 7, 2008, resulted in a diagnosis of an occipital neuralgia on the right with recommendations for an ice pack and the possibility of an occipital nerve block. Claimant's reflexes were noted to be intact. Dr. Applebaum, also examined claimant on May 7, 2008, and he indicated that claimant had no evidence of cervical or intracranial disease on the MRI scan. Claimant was released to return to work with a recommendation of no heights.

Claimant was seen by Joseph Galate, M.D., on June 16, 2008, for a second opinion. Dr. Galate questioned whether claimant had a hairline fracture to his clavicle and recommended anti-inflammatory medications. He did not think claimant had greater occipital neuralgia. Dr. Galate noted that claimant displayed some decreased range of motion in the cervical spine. Claimant continued on physical therapy and was limited to seated work only.

Claimant saw James S. Zarr, M.D., on September 26, 2008, for an additional opinion. Dr. Zarr recommended that claimant be provided pain management and trigger point injections. Claimant displayed a limited range of motion of the cervical spine with persistent neck and upper back pain radiating into headaches. Claimant also displayed tenderness to palpation in the cervical paraspinal muscles, thoracic paraspinal muscles, trapezius ridge, rhomboids and suboccipital muscles bilaterally.

On October 16, 2008, claimant went to Pain Care to see Daniel Bruning, M.D., who evaluated him for cervical epidural injections. One was administered on October 16, 2008. On January 19, 2009, claimant was examined by orthopedic surgeon Adrian P. Jackson, M.D. Dr. Jackson could find no abnormality on physical examination. He read over claimant's x-ray findings and concluded that claimant had a cervical strain. The cervical epidural injections were seen as beneficial, but the MRI was not impressive. Claimant returned to Dr. Jackson on February 18, 2009. Dr. Jackson did not feel claimant was a candidate for surgery, but did find compressive pathology at C3-4. Claimant's main component was muscular soreness. Dr. Jackson had no good explanation why claimant was still suffering from the injury. He felt that claimant should follow up with a physiatrist. On February 27, 2009, claimant returned to physiatrist Dr. Zarr, who found claimant in a static position. He recommended that claimant advance to a work hardening program, which claimant did at ARC Athletic and Rehabilitation Physical Therapy. This was followed by a functional capacity evaluation (FCE), which indicated claimant could lift 37 pounds above the shoulder, 40 pounds from desk to chair height and 45 pounds chair to floor. Claimant displayed valid participation. It was felt that claimant did not meet the physical demands for his job. On March 27, 2009, claimant returned to Dr. Zarr for a disability rating. But, Dr. Zarr's rating opinion is not in the record.

On June 17, 2009, claimant was referred by his attorney to board certified orthopedic surgeon John A. Pazell, M.D., for an evaluation. Claimant's major complaints were neck and head pain, 7 to 9 on a 10-point scale; shoulder pain; back pain; ringing in the ear, off and on; dizziness; and off balance. Claimant also had memory problems;

and tingling in the fingers and arm, off and on. Claimant also experienced occipital frontal headaches, trouble sleeping and trouble with his head, neck and auricular pain. He also had pain into his arms, pain with coughing and sneezing, and pain which increases with weather changes. Dr. Pazell reviewed claimant's extensive medical evaluation and treatment history. Dr. Pazell then provided claimant with a physical examination. Claimant displayed muscle spasm in the right and left upper trapezius with range of motion limitations of the cervical spine. Grip strength tests were consistent bilaterally, and there was no atrophy noted bilaterally in claimant's upper extremities. Claimant's thoracic spine examination, lumbar spine examination and examinations of his shoulders, elbows, wrists, hips, knees and ankles were normal. Claimant was diagnosed with a herniated intervertebral disk at C3-4 from the February 20, 2008, accident. Dr. Pazell determined that claimant had not reached MMI. However, he went on to issue an impairment rating, pursuant to the fourth edition of the AMA *Guides*[3] DRE Category III, of 15 percent to the whole person for claimant's cervical spine injury. Dr. Pazell cautioned that while he was providing an impairment rating, he felt that claimant had not reached MMI. He recommended an MRI scan of the cervical spine, followed with a CT scan, an EMG evaluation, another trial of cervical epidural injections and an evaluation by an impartial spine surgeon regarding a possible C3-4 surgical stabilization.

Dr. Pazell was provided a task list created by vocational expert Michael J. Dreiling with 18 tasks on the list. Of the 18 tasks, Dr. Pazell opined that claimant can no longer perform 11 for a task loss of 61 percent. Dr. Pazell has not seen claimant since the evaluation on June 17, 2009, and has no idea whether claimant has reached MMI. In a letter to claimant's attorney dated March 22, 2010, Dr. Pazell objected to what was perceived as the opinion of Stephen L. Reintjes, M.D., that claimant's injury of February 20, 2008, was not connected with claimant's ongoing symptoms. Dr. Pazell described this opinion as being "totally unreasonable".[4]

Claimant was referred by the ALJ for an independent medical examination (IME) to board certified neurosurgeon Dr. Reintjes on October 7, 2009. Either Dr. Reintjes, Dr. Burton or Dr. Pratt was to provide the evaluation, whichever was available first. The examination was for authorized treatment if claimant needed medical care, and if at MMI, a rating and restrictions were requested. Dr. Reintjes, apparently the first to be available, found swelling in claimant's supra clavicular fossa bilaterally with a diffuse decrease in pinprick sensation in the right upper extremity. He discussed the MRI scan of the cervical spine as not showing any evidence of disc herniation or stenosis. He diagnosed persistent neck pain and a closed head injury previously with loss of consciousness. He gave no surgical recommendation but did recommend a bone scan to rule out any underlying

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] Pazell Depo., Ex. 3.

fracture or injury. He related claimant's complaints of neck pain with muscle spasm and headache to the work injury of February 20, 2008.

Dr. Reintjes again evaluated claimant on November 16, 2009, after claimant underwent a bone scan which showed increased uptake in the lumbar spine and upper sacrum but no increased uptake in the neck. He had no surgical recommendation for claimant but did recommend an evaluation by a physiatrist for claimant's ongoing musculoskeletal complaints.

At the regular hearing, the parties stipulated that "Dr. Jackson's restrictions are appropriate for the claim".[5] However, the restrictions of Dr. Jackson were not placed into the record at that time. The only reference to Dr. Jackson's restrictions is in the April 15, 2010, report of Mr. Dreiling. Those restrictions are listed as "no repetitive bending or lifting, no overhead lifting, and no lifting more than 15 pounds".[6] It does not appear that Dr. Pazell utilized the restrictions of Dr. Jackson when determining claimant's need for restrictions, impairment, if any, and any task loss claimant may have suffered. At the regular hearing, the parties did not stipulate that only Dr. Jackson's restrictions were to be used in this matter.

Claimant's exhibit 1, to claimant's October 5, 2010, deposition, is a compilation of claimant's earnings with respondent from his hire in 1997 up to the date of accident. Both claimant and his wife, Colette, testified to the accuracy of the wage earning records. The exhibit clearly identifies claimant's earnings from 1997 through 2001 were earned primarily in the State of Kansas. Of claimant's total earnings during that time of $182,499.94, claimant earned $169,994.14 or 93 percent in Kansas. From 2002 through claimant's date of accident, claimant earned $344,188.23 in wages with respondent. Of that amount, claimant earned $235,845.15 in Missouri and $108,343.08 in Kansas, or 69 percent earned in Missouri and 31 percent earned in Kansas. For the entire period that claimant was employed with respondent, he earned $526,688.17 in wages. Of that amount, $278,337.22 was earned in Kansas, a total of 52.8467 percent. As of the time of claimant's deposition on October 5, 2010, claimant remained unemployed.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[7]

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[5] R.H. Trans. at 4.

[6] Dreiling Depo., Ex. 2 (Dreiling's report dated April 15, 2010, at 1).

[7] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[8]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[9]

The ALJ found that claimant's principal place of employment was in Kansas due to the fact that the majority of claimant's earnings during his employment with respondent were earned in Kansas. As noted above, over the entire period of claimant's employment with respondent, he earned almost 53 percent of his income while working in Kansas.

> The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: *Provided*, *however*, That the workmen's compensation act shall apply to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.[10]

Legislative history establishes that the phrase "principal place of employment" refers to the employee's principal place of employment.[11] Unfortunately, in a case such as this, where a claimant's employment spans a number of years, neither the history nor case law sheds light on whether the employee's principal place of employment should be a function of time, task or, as here, earnings. As found by the ALJ, claimant over the span of his employment with respondent, earned the majority of his income while working in Kansas. In this instance, the ALJ found, and the Board agrees, that claimant's principal place of employment was in Kansas. Therefore, the provisions of the Kansas Workers Compensation Act (Act) apply to this matter. Additionally, from this record, it is found that

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[8] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[9] K.S.A. 2008 Supp. 44-501(a).

[10] K.S.A. 44-506.

[11] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

claimant was hired in Kansas when he completed paperwork and reported to work at the Olathe job site.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[12]

The parties have stipulated that, if this matter was found compensable in Kansas, then claimant has a 10 percent whole body functional impairment. This leaves the only issue to be determined to be what permanent partial general (work) disability claimant suffered, if any, as the result of this injury.

The Board will first consider what, if any, task loss claimant suffered from this accident. The only task loss opinion in the record is that of Dr. Pazell that claimant has a 61 percent loss based upon the task list created by Mr. Dreiling. Respondent contends that Dr. Pazell's opinion cannot be used as he did not base his task loss opinion on the restrictions of Dr. Jackson. The parties stipulated at the regular hearing that Dr. Jackson's restrictions "are appropriate for the claim".[13] However, the stipulation does not state that Dr. Jackson's restrictions are the only restrictions that can be used in this matter. Additionally, the restrictions are only contained in the deposition of Mr. Dreiling. Had the parties intended for the restrictions of Dr. Jackson to totally control this matter, a more specific stipulation would have been expected. As such, the Board does not exclude Dr. Pazell's task loss opinion as respondent requests. The task loss opinion of Dr. Pazell can be appropriately utilized in this matter to establish claimant's task loss under K.S.A. 44-510e. The Board adopts the opinion that claimant suffered a 61 percent task loss in this matter. On that issue, the finding of the ALJ is affirmed.

The Board must next consider what wage loss, if any, claimant suffered herein. It is undisputed that, as of the time of his deposition on October 5, 2010, claimant had not returned to work. Therefore, he has suffered a wage loss of 100 percent.[14] However, respondent contends that the only medical opinions in this record, those from Dr. Pazell and Dr. Reintjes, indicate that claimant is not at MMI. Both have recommended added medical treatment for claimant's injuries. Thus, respondent argues claimant's disability is not permanent and, therefore, neither claimant's task loss nor his wage loss can be

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[12] K.S.A. 44-510e.

[13] R.H. Trans. at 4.

[14] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

ascertained at this time. However, at the time of the regular hearing, the parties stipulated that claimant's permanent functional impairment was 10 percent to the whole body. This stipulation satisfies the functional impairment question and the permanency issue for disability. The Board finds claimant is at MMI for the purposes of this award.

Pursuant to K.S.A. 44-510e, the Board averages the 61 percent task loss with the 100 percent wage loss and finds that claimant has suffered a permanent partial general (work) disability of 80.5 percent. The Award of the ALJ in this regard is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated December 2, 2010, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jerry L. Adams, Jr., and against the respondent, J.E. Dunn Construction Company, and its insurance carrier, American Home Assurance Company, for an accidental injury which occurred on February 20, 2008, and based upon an average weekly wage of $1,841.01.

Claimant is entitled to 20.21 weeks of temporary total disability compensation at the rate of $510.00 per week totaling $10,307.10, followed by permanent partial disability compensation at the rate of $510.00 per week not to exceed $100,000.00 for an 80.50 percent permanent partial general disability.

As of April 28, 2011, there would be due and owing to claimant 20.21 weeks of temporary total disability compensation at the rate of $510.00 per week totaling $10,307.10, plus 145.93 weeks of permanent partial disability compensation at the rate of $510.00 per week totaling $74,424.30, for a total due and owing of $84,731.40 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining

balance in the amount of $15,268.60 shall be paid at the rate of $510.00 per week until fully paid or until further order from the Director.

Although the ALJ's Award approves claimant's contract of employment with his attorney, the record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant for approval.[15]

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority. Claimant's principal place of employment should not be found to be Kansas. While it is true that claimant's total income over the total period of his employment with respondent leading to the date of the accident accounted for slightly over 50 percent earnings in Kansas, the actual determination should be made with a more focused analysis of the earnings and the years involved in those earning periods. While claimant initially earned substantial amounts of his income in Kansas during the first four to five years, that equation dramatically changed during the last six to seven years of employment. Claimant's earnings from 1997 to 2001 were almost exclusively in Kansas. But, in the last years, from

[15] K.S.A. 44-536(b).

2002 through the 2008 date of accident, the earnings came from Missouri by two to one over Kansas.

In *Knelson*,[16] the claimant lived in and worked out of Wichita, Kansas. He worked for no other company. He was paid in Wichita and a significant number of his hockey games were played in Wichita. The Court's finding that Knelson's principal place of employment was Kansas was easily determined.

In the present matter, claimant was hired by a Missouri company, with membership in a Missouri union being required. For the last several years, claimant's earnings came from Missouri, almost two to one. A principal place of employment, once established, is not set in concrete. Here, during the first several years, claimant was obviously stationed in Kansas the vast majority of the time. However, over time, that fact changed. Claimant's work gravitated to Missouri, and his principal place of employment also changed.

This Board Member would find that claimant's principal place of employment "at the time of the accident" was Missouri, and the Kansas Workers Compensation Division does not have jurisdiction over this matter.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier American Home Assurance Company
Midwest Builders Casualty Mutual Company, 1100 Walnut St, Ste 3010, Kansas City, Missouri 64106-2197
Steven J. Howard, Administrative Law Judge

[16] *Knelson, supra.*